

REMARKS

The Examiner has provisionally rejected claim 1-13 under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 3-5 and 9 of application no. 09/717,771 (the '771 application).

Applicant does not agree that the pending claims of this application are not patentably distinct from those in the '771 application. However, Applicant points out that the provisional rejection is inappropriate, since it is the only rejection remaining to the pending claims. The MPEP, §804 I.B makes clear that a provisional rejection under these circumstances is improper:

The 'provisional' double patenting rejection should continue to be made by the examiner in each application as long as there are conflicting claims in more than one application unless that "provisional" double patenting rejection is the only rejection remaining in >at least one of the applications.

In the alternative, Applicant requests the provisional rejection be withdrawn because the '771 application has gone abandoned. A continuation application, serial number 11/178,889 (the '889 application), has been filed which claims priority to the '771 application. However, Applicants intend to file a preliminary amendment in the '889 application, thereby rendering any double patenting rejections moot. Thus, Applicant submits that a double patenting type rejection is more appropriate, if at all, in the '889 case than in the current case.

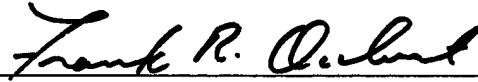
No fee is believed to be due. A refund is believed to be due from a terminal disclaimer fee filed with the communication of August 18, 2005, where no terminal disclaimer was actually filed. If any fee is due or a refund is warranted, please apply such charges or credits to deposit account 06-1050, referencing 10449-026001.

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Serial No. : 09/718,155
Filed : November 21, 2000
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Attorney's Docket No.: 10449-
026001 / P1S2000215US

Respectfully submitted,

Date: November 29, 2005



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